No. 89-1279

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, AND EDDIE HARGROVE
Respondents

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S. IN SUPPORT OF RESPONDENTS

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July, 1990

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STATEMENT OF CONSENT AND INTEREST OF THE AMICUS CURIAE

This brief is filed with the consent of the parties.

The Consumers Union of United States is a non-profit membership organization founded in 1936. It engages in consumer advocacy before the executive, judicial, and legislative branches of government. Consumers Union is committed to preserving the role of punitive damages and ensuring a responsive and consumer-oriented tort system. Without such a system, Consumers Union members will be denied a legal remedy that serves to increase efficiency, deter the production of unsafe products, and provide incentives to improve insurance and other professional services. Further, Consumers Union members would be harmed if corporate accountability inherent in vicarious liability was modified or lessened.

SUMMARY OF ARGUMENT

There is insufficient data to conclude that a tort/punitive damage crisis exists at a level appropriate to justify unprecedented intrusion into state tort law, stretching and perhaps exceeding the limits of due process.

There are multiple and beneficial state objectives critical to the interests of consumers furthered by punitive damages nationally and in Alabama. The procedures for determining those damages require a full trial and compulsory post-trial review. Jury instructions in this case reflected accurately Alabama law and articulate the proper goals of punishment and deterrence. As such, the Alabama system for determining punitive damages conforms with the requirements of procedural and substantive due process.

ARGUMENT

I

THERE IS NO TORT CRISIS JUSTIFYING EXTRAORDINARY INTERVENTION BY THE UNITED STATES SUPREME COURT.

During the last ten years the tort system--and particularly the various systems for determining punitive damages--has come under close scrutiny. (See Appendix A.) "Tort reformers" who contend that the system has become unbalanced and weighted unduly in favor of plaintiffs spar with various plaintiff and consumer groups who defend the tort system and seek to make it function more effectively. The role of this Court has been limited to declaring that the excessive fines clause of the Eighth Amendment is unavailable as a means of reviewing punitive damages. See Browning-Ferris Indus. v. Kelco Disposal, 109 S. Ct. 2909, 2913-20 (1989); Crenshaw, 486 U.S. 71, 76-78 (1988).

In the present case, this Court has

agreed to consider whether the system for determining punitive damages in the state of Alabama comports with the constitutional requirement of due process. It appears a motivation to consider this matter comes from the belief that punitive damages nationally are "out of control," depriving parties of fundamental fairness. Browning-Ferris, 109 S. Ct. at 2923 (Brennan, J., concurring), Bankers Life & Casualty v. Crenshaw, 436 U.S. at 87-88 (O'Connor, J., concurring).

Although there is a growing body of literature in the field of punitive damages, the assessment is not complete nor is a clear conclusion emerging. A recent comprehensive study funded by the American Bar Foundation concludes that there is no punitive damage crisis based on a careful evaluation of 25,000 jury verdicts and related statistics. Daniels & Martin, Myth and Reality in Punitive

Damages, ABF Working Paper 8911, Am. Bar Found. 63 (1990) [Daniels & Martin 1990]. Although the amici in this case assert to the contrary, there is no clear and unequivocal data suggesting a national crisis sufficient to compel intrusive judicial intervention, stretching the limits of the due process clause, to address a problem that may well not exist.[1]

A 1986 study of over thirty jurisdictions in ten states from 1981-1985 asserts that punitive damages were not routinely awarded. Daniels, Punitive Damages: Storm on the Horizon?, Preliminary Report of the Punitive Damages Project Study, Am.

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[1]A diverse group of scholars have written that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, New Light on Punitive Damages, 33 Reg. October 1986; Burrow & Collins, Insurance Crisis--Texas Style: The Case for Insurance Reform, 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform, 18 St. Mary's L.J. 673, 695 (1987).

Bar Found. Fellows Seminar, ABA Midyear Meeting, Baltimore, Md. (February 8, 1986) [Daniels 1986].

The study found that punitive damage awards in cases where plaintiff won a money judgment ranged from 0.0 percent of all reported verdicts in four sites to a high of 21.6 percent in one site. For two-thirds of the surveyed sites, the percentage of reported verdicts in which plaintiff won money was less than ten percent. In New York City, only 1.6 percent of awards included punitives, 2.2 percent in Cook County, Illinois (which includes Chicago), and 8.6 percent in Los Angeles County, California. Daniels 1986 at 11. The Landes & Posner study, supra note 1, of federal courts from 1982 to November of 1984 found four punitive damage awards upheld out of 172 cases, and of 359 product liability, punitives were allowed in only two percent. A RAND study of civil jury

trials in San Francisco, California, and Cook County, Illinois, between 1960-1984 found only eight awards of punitive damages in product liability cases. Peterson, Punitive Damages: Preliminary Findings, The RAND Corporation, Institute for Civil Justice (1985).

Critics of punitive damage awards distort statistical images through the use of numerical averages. For example, in the RAND Cook County study, the average award was $137,350, but 87.7 percent of the cases had awards lower than the average, with a median of $8,800. Medians are the appropriate measure since they reflect the typical award or the dollar amount for the case at the 50th percentile when awards are listed from lowest to highest in ascending order. Daniels & Martin 1990 at 42-43; Daniels 1986 at 13. The fact is that "[t]he predicted unmanageability of punitive damages has failed to appear.

Experience has shown that judicial oversight of punitive damages awards has greatly reduced the risk of substantial over-deterrence." Reisberg, In Defense of Punitive Damages, 55 N.Y.U. L. Rev. 303, 345 (1980). There are two juried empirical and systematic studies of punitive damages, and neither supports the proposition that there is a national crisis in punitive damages.[2]

There are situations were judicial action is justified based on stark principles of fairness, where empirical, sociological, or economic data compels a response, e.g., Brown v. Board of Education, 347 U.S. 483 (1953). Such data does not

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[2]Daniels & Martin 1990 and Petersen, Sarma & Shanley, Punitive Damages: Empirical Findings" (RAND, Institute for Civil Justice, 1987). Prentice, Reforming Punitive Damages: The Judicial Bargaining Concept, 7 Review of Litigation 113, 123 (1988). ("The attack on punitive damages is part of a wide-ranging, well organized attack on the current tort system. . . . There is substantial evidence that the claims of runaway punitive damages are greatly exaggerated.")

yet exist in the area of punitive damages. Nevertheless, the claim is made that somehow in the last few years juries receiving the same information they have received since Day v. Woodworth, 54 U.S. (13 How.) 363 (1851), have engaged in irresponsible behavior. Bluntly, "[t]here is no systematic empirical evidence that juries are excessively plaintiff oriented." Daniels & Martin 1990 at 9.

This Court must avoid scrupulously the mischaracterizations that have been put forward regarding the state of punitive damages.

> Horror stories and their implications are presented as if they are representative of what is typical, describing a system run amuck and in need of fundamental and immediate change. Such vivid stories typically distort the actual facts of situations described. . . . The stories are meant to foster the acceptance of a particular characterization of the civil justice system and punitive damages. . . . The view is portrayal as one so obvious and common-sensical that no reasonable person could disagree. . . .

Daniels & Martin 1990 at 22. Press kits

and news releases have become the tools of jurisprudential debate, rather than case analysis and synthesis of jury verdict statistics. Daniels & Martin 1990 at 24. However, an analysis of the hard data put forward in support of tort reform and modification of punitive damages provides "little if any, reliable evidence on the punitive damage system." Daniels & Martin 1990 at 29.

> In general, then, it does not appear from our data that punitive damages are routinely awarded in the sites studied, contrary to what would be expected in light of the rhetoric of crisis and reform. Nor were punitive damages typically given in amounts that would "boggle the mind." Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest.

Daniels & Martin 1990 at 44.

In the absence of unequivocal data suggesting a crisis in the punitive damage area, judicial intervention can be justified only if the Alabama method for determining punitive damages at the time this

case was decided violates due process.

II

PUNITIVE DAMAGES ARE INTEGRAL TO OUR COMMON LAW HERITAGE AND ARE HIGHLY BENEFICIAL TO CONSUMER INTERESTS.

A. Punitive Damages Are Part of Our Common Law Heritage.

In Day, 54 U.S. at 371, this Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated.[3] In Missouri Pacific Ry. v. Humes, 115 U.S. 512, 5[illegible] (1885), this Court approved the use of punitive damages to "blend together the interests

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[3]Common law affirmation of punitive damages can be traced back centuries through the Magna Carta, see Browning-Ferris, 109 S. Ct. 2909, 2919-20 (1989), but usually begins with a look at Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763), and Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763). The nineteenth century view of punitive damages was that the doctrine was "too well settled now to be shaken, that exemplary damages may in certain cases be assessed." Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 492 (1875); Fleet & Semple v. Hollenkemp, 52 Ky. (13 B. Mon. 219) 175, 180 (1852); Merrells v. The Tariff Mfg. Co., 10 Conn. 388 (1835); Linsley v. Bushnell, 15 Conn. 225 (1842).

of society and the aggrieved individual." Constitutionality of punitive damages was considered in Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 36 (1889), holding: "The imposition of punitive or exemplary damages . . . cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." Looking to the legal systems in the United States, Great Britain, and even to Roman law, it is evident that punitive damages are a fundamental part of our jurisprudence.[4]

More recently, this Court allowed the use of punitive damages in the civil rights and defamation areas even though such damages might have a chilling effect on speech or intimidating effect on cer-

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[4]D. Pugsley, The Roman Law of Property and Obligations 31 (1972); B. Nicholas, Roman Law 210 (1962); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1262, n.17 (1976); The Vitality of the Doctrine of Punitive Damages in Maine, 35 Me. L. Rev. 447, 451 (1983).

tain law enforcement functions.[5] This Court has not engaged in a due process review of punitive damage award amounts.[6] The absence of systemic review may be because "the availability of punitive damages in civil cases was well known to the framers of the Fourteenth Amendment, as it had been for centuries." Germanio v. Goodyear Tire & Rubber, 732 F. Supp. 1297, 1303 (D.N.J. 1990).

B. Punitive Damages Further the Rational State Interests of Upgrading the Quality of Consumer Goods and Services.

Punitive damages are vital to the

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[5]Smith v. Wade, 461 U.S. 30 (1983), permitted punitive damages in 42 U.S.C. § 1983 (1982) actions and affirmed the validity of punitive damages as a deterrent to misconduct. 461 U.S. at 36-37 n.5; and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), upheld the use of punitive damages despite the potential effect on speech. See also Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[6]But see St. Louis, Iron Mt. & So. Ry. v. Williams, 251 U.S. 63, 66-67 (1919), requiring courts to guard against grossly excessive verdicts, and Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966), holding invalid a system that provides jurors no guidance on awards.

protection of consumers. With the minimum of transaction costs, they achieve the dual goals of punishment of specific actors and industrywide deterrence for future misconduct and creation of incentives to upgrade the quality of goods and services.[7] Individuals who suffer at the hands of others whose behavior is sufficiently bad to be characterized as intentional or wanton misconduct are in no way winners of some bizarre lottery. The destruction of family life, the trauma of

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[7]Beyond punishment and deterrence, punitive damages provide resources to aggrieved plaintiffs who have been thrust into an abnormal risk category. See, e.g., Evans v. Philadelphia Transportation Co., 418 Pa. 567, 212 A.2d 440 (1965); Focht v. Rabada, 217 Pa. Super. 35, 268 A.2d 157 (1970); Restatement (Second) of Torts § 908 (1979). A few states are straightforward in discussing the functions of punitive damages beyond punishment and deterrence: Hicks v. Herring, 246 S.C. 429, 144 S.E.2d 151, 155 (1965), allows punitive damages to vindicate a private right. Jolley v. Puregro Co., 94 Idaho 702, 496 P.2d 939, 947 (1972), permits punitive damages for "rectification of wrongs"; Oppenhuizen v. Wennersten, 2 Mich. App. 288, 139 N.W.2d 765 (1965), permits punitive damages to address embarrassment.

protracted litigation, the displacement of emotional equilibrium, and various costs[8] pertaining to pursuing legal claims can be addressed by a punitive damage award. Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1257, 1296-98 (1976).

It is argued regularly that compensatory damages cover the needs of injured persons and deter future misconduct. Such arguments are devoid of empirical support.[9] Punitive damages are often awarded

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[8]A very few states permitted punitive damages for the purpose of assisting with attorneys fees. Lanese v. Carlson, 32 Conn. Supp. 163, 344 A.2d 361, 364 (1975); Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692 (1930). Other jurisdictions allow punitive damages for "inconvenience, reasonable attorneys fees, and other losses too remote to be considered under actual damages." Pan Am Petroleum v. Hardy, 370 S.W.2d 904, 908 (Tex. Civ. App. 1963). Other states recognize that punitive damage awards encourage private persons to bring wrongdoers before the court, e.g., Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972).

[9]Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961); Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co., 515 F. Supp. 64, 104-05 (D.S.C. 1979), aff'd, 644 F.2d (Cont'd)

after a multi-year pattern of misconduct, interspersed with various compensatory damage awards which did not deter the defendant, prompting the Supreme Court of Minnesota to conclude that punitive damages are particularly effective in preventing repetitive forms of misconduct. Gryc v. Dayton-Hudson, 297 N.W.2d 727 (Minn.), cert. denied, 449 U.S. 921 (1980).

In the state of New York, the deterrence function of punitive damages is well recognized:

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877 (2d Cir. 1981), holding that punitive damages deter manufacturers from misconduct, encourage the production of safer products, and "serve as a type of private revenge which is carried out in the courts rather than through duels or in back alleys." The court held further "there is no exact monetary standard which can be used as a measure. . . . There is no formula for punitives as the amount to be awarded is peculiarly within the judgment and discretion of the jury, subject to the supervisory powers of the trial judge over jury verdicts. . . . The main things to be considered are the character of the tort committed, the punishment which should be meted out therefore, and the ability of the wrongdoer to pay." 515 F. Supp. at 105-06.

> A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961).

The need for punitive damages in the insurance industry is undeniable.

> If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impugnity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that the claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977). In insurance rela-

tionships the potential of punitive damages provides consumers with some force at the bargaining table.

> [T]he relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with the recognition of insurers' underlying public obligation and reflects an attempt to restore balance in the contractual relationship.

Hirsch, Strict Liability: A Response to the Gruenberg-Silberg Conflict Regarding Insurance Litigation Awards, 7 S.W.U. L. Rev. 310, 326 (1975).

These benefits are of particular import since state insurance regulation has not provided a significant countervailing force to insurance industry power. Insurance regulation has been characterized by "apathetic administrative agencies and lethargic legislative bodies providing little discipline to an industry that has enormous power over the well-being of American consumers." Levine, Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions, 13 U.S.F. L. Rev. 613, 615 (1979). While it may take years to promulgate an insurance regulation, there is generally a stunning and prompt reaction to a punitive damage award in the insurance industry. Punitive damage awards against insurance companies prompt action and stern admonition to exercise greater care in dealing with consumers, eliminate fraudulent practices, develop training programs for employees, and engage in oversight of staff. Levine, supra, at 625-27.

An opinion from this Court that dilutes the punitive damage system would have a deleterious effect on the benefits derived from punitive damage awards and frustrate the ability of states to achieve these rational objectives.

C. **Consumer Advantages from Punitive Damages Would Be Undercut by Mandating a Fixed Formula or Proportionality Rule.**

A decision that compels the states to establish fixed ratios for punitive damages would allow business interests to calculate easily the proper sum to be set aside to accommodate judgments. This would have a disastrous effect on the deterrent value of punitive damages.

> Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and their resulting limited compensatory expenses. They must know that their financial existence may be threatened by the evil they contemplate.

Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 833 (1987). Generally, courts favor an individualized punitive damage system not bound by mathematical equations.

> The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish and . . . the amount which must be awarded. . . .

Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co., 515 F. Supp. 64, 106 (D.S.C. 1979), aff'd, 644 F.2d 877 (2d Cir. 1981).[10] Some courts[11] have struggled to find a proper calculation mechanism but have come up empty handed:

> Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so.
>
> Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damage awards, applying those factors in the custom-

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[10] See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180-81 n.9 (1931), rejecting proportional ratios as "arbitrary"; Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1258, 1316 (1976), rejecting ratios due to their failure to take into account appropriate damage factors.

[11] Linsley v. Bushnell, 15 Conn. 225, 235 (1842), "there is no rule of damages fixed by law" to accommodate punitive damages.

ary manner to reach what we believe is a decision consistent with precedent.

Devlin v. Kearney Mesa AMC/Jeep Renault, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204, 209 (4th Dist. 1984). Like California, Alabama imposes no specific formula for punitive damages.[12]

This Court has suggested that a plaintiff's entitlement to the "recovery of uncertain damages" is not flawed constitutionally, though defendants are entitled to certainty in ascertaining what conduct is wrong.[13] Story Parchment v. Patterson Parchment Paper, 282 U.S. 555,

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[12] See Foster v. Floyd, 276 Ala. 428, 163 So. 2d 213 (1964); Note, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 Pac. L.J. 823, 852 (1979); Borowsky, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 164-65 (1983), condemning the reasonable relation rule as a decisional pretext.

[13] A ratio rule "undermines the deterrent effect of punitive damages by stressing the actual resulting harm rather than the social undesirability of the defendant's conduct." Comment, Punitive Damages: An Appeal for Deterrence, 61 Neb. L. Rev. 651, 676 (1982).

562 (1930). Recently, this Court characterized punitive damages as a "legal remedy that is not a fixed fine." Tull v. United States, 481 U.S. 412, 423 n.7 (1987). Tull follows well established precedent that defendants have no particular entitlement to a fixed maximum in cases where punishment is in the form of a fine. Standard Oil Co. of Indiana v. Missouri, 224 U.S. 270, 286 (1911).

The value of not being bound to a set formula is apparent when a defendant causes only minor compensatory losses but acts with an intention, vengeance, or hostility requiring substantial punishment. In such cases, to use a multiple of compensatory damages is arbitrary. The quest for formulae and limits stems from the perception that punitive damage awards are wildly disportionate to compensatory damages. On the average, in those few cases where punitive damages are awarded, for

every dollar of compensatory damages, about $1.50 is awarded for punitives, with the ratio between punitive damages and compensatory damages ranging from 0.67 to approximately 3.6. Daniels & Martin 1990 at 56-60. Were a state or a court to adopt a trebling mechanism, as suggested by some of the amici, then the actual dollars spent on punitive damages may increase substantially.

A directive to impose fixed multiples or other means of ensuring certainty stems also from the perception that jury instruction is "standardless." In the present case the jury was told to consider punishment, deterrence, and the proportional relationship between the wrongfulness of the defendant's act and the award. Reviewing a similar situation in North Dakota, Judge Van Sickle held as follows:

> This court is not convinced that a jury's determination of punitive damage awards is "standardless." The standard the jury applies in determining whether to grant an award is the culpability of the defendant. To determine the amount of the award, the jury determines the amount needed to deter such behavior in the future, the amount it takes to make certain types of conduct unprofitable.

Puppe v. A.C. & S., Inc., 733 F. Supp. 1355, 1362 (D.N.D. 1990).

As a matter of its substantive law, Alabama has decided that "[p]unitive damages need bear no particular mathematical relationship to actual damages." Foster v. Floyd, 276 Ala. 428, ___, 163 So. 2d 213, 217 (1964), citing Bell v. Preferred Life Assurance Society of Montgomery, 320 U.S. 238 (1943). Unless this Court wishes to perform the role of the Alabama state legislature, it must avoid tampering with the decisions of that body.

In summary, there is ample data to conclude that there is no crippling tort crisis, that punitive damages provide a significant benefit in deterring unacceptable behavior, and that remedies such as

ratios would be destructive to the rational and reasonable objectives of states such as Alabama. A judicial directive limiting punitive damages would be an unprecedented intrusion on the right of the state to accomplish rational state objectives.

D. **Punitive Damages Exert Positive Market Pressure to Upgrade the Quality of Goods and Services.**

Recently, it has been contended that punitive damages have an adverse effect on the competitive posture of the United States. Browning-Ferris, 109 S. Ct. at 2924 (O'Connor, J., dissenting); Daniels & Martin 1990 at 22. Quite simply, there is no solid empirical basis to support the proposition.

It seems incredulous to assert that a system that condemns products or services produced fraudulently, in a grossly negligent manner, or in a way that comports with intentional misconduct is destructive

of the competitive posture of the United States. In Man v. Raymark Indus., 728 F. Supp. 1461 (D. Haw. 1989), the court considered whether punitive damages have a detrimental effect and prevent manufacturers from developing new products due to their fear of "uncertain liability."

> This court respectfully suggests that if that is indeed what is happening [to proposed new products], then punitive damages are accomplishing a worthy goal. In this respect it is important to remember that punitive damages are awarded for some form of outrageous misconduct, never for simple negligence. A manufacturer who vigilantly and honestly tests his product can have no fear of punitive damages.

728 F. Supp. at 146 n.7.

A companion attack is that punitive damages divert substantial resources away from research and development. This argument borders on the absurd for two reasons. First, there is only a miniscule level of direct or real dollar loss from punitive damages. Landes & Posner, supra; Daniels & Martin 1990 at 33-35. Second,

the vast majority of punitive damage awards do not involve consumer goods such as pharmaceutical products; rather, they involve personal violence, false arrest, malicious behavior, or intentional misconduct. Daniels & Martin 1990 at 48, 50, and 56. It seems most unlikely that U.S. problems in international competitive markets stem from punitive damage awards that deter fraud or punish intentional wrongdoers.

III

ALABAMA PUNITIVE DAMAGES LAW COMPORTS WITH CONSTITUTIONAL REQUIREMENTS OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

A. The History of Substantive Due Process Mandates Restraint in Assessing State Programs that Affect Economic Interests.

Probing substantive due process review is reserved for constitutional assessments of fundamental entitlements. A system that allows punitive damage awards affecting property interests need

satisfy only the rational basis test.

Where the substance of a law is challenged under the due process clause, the starting point for analysis should be Lochner v. New York, 198 U.S. 45 (1905), one of the "most ill-starred decisions that [the Court] ever rendered."[14] The majority declared unconstitutional a New York workplace safety law. The Court balanced public safety and freedom of contract and, coming to a result opposite that of New York lawmakers, used substantive due process to assert their will.[15] For the next thirty years the Court used

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[14]Rehnquist, The Supreme Court--How It Was, How It Is at 205.

[15]Justice Holmes dissented, admonishing that "[a] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions . . . shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. 198 U.S. at 75-76.

substantive due process "to strike down state laws, regulatory of business and industrial conditions, because they . . . [were thought to] be unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

Lochner "wisdom substitution" subsided with Nebbia v. New York, which held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." 291 U.S. 502, 537 (1934).[16]

In Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952), the Court refused to invalidate a rationally-based

[16]"[S]tates have power to legislate against . . . injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid Federal law." Lincoln Union v. Northwestern Co., 335 U.S. 527, 537 (1949). See West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

state statute, declaring they "do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

In Moore v. East Cleveland, 431 U.S. 494 (1977), this Court cautioned against judicial redrafting of state law where the outcome would rest on "the predilections of those who happen at the time to be Members of this Court" rather than on a firm constitutional basis. 431 U.S. at 502. These cases reflect self-imposed judicial restraint, an accurate vision of the judiciary, and compel states to be accountable for formulating credible economic policy.

Restricted review does not occur when assessing "statutes directed at particular religious, or national, or racial minorities . . . which tend . . . seriously to curtail the operation of those political processes ordinarily to be relied upon to

protect minorities. . . ." United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938). These cases employ a careful review of state law on fundamental entitlements or privacy interests within the penumbral privacy domain of the First Amendment, none of which bear the slightest resemblance to the interests asserted by petitioner in this case.[17]

Petitioner's quest for "substantive review" of punitive damages based on due process seems particularly far afield when consideration is given to those critical, basic areas where the Court has refused to apply substantive due process. In Bowers

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[17]See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (involving abortion); Boddie v. Connecticut, 401 U.S. 371 (1971), and Loving v. Virginia, 388 U.S. 1 (1967) (involving freedom of choice in marital decisions); Griswold v. Connecticut, 381 U.S. 479 (1965), involving marital privacy; Carey v. Population Services Int'l, 431 U.S. 678 (1977) (purchase of contraceptives); Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923) (involving child rearing).

v. Hardwick, 478 U.S. 186 (1986), the Court declined to extend the notion of fundamental rights to homosexual relations and refused to

> take a more expansive view of [their] authority to discover new fundamental rights imbedded in the Due Process Clause. . . . [T]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. [When that occurs] . . . the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

478 U.S. 186 at 194-95.

A complaint about a state system of punitive damages that punishes and deters future misconduct does not involve a fundamental right, involves no language or concept having "cognizable roots" in the Constitution, and would require a redefinition of constitutional entitlements, a process hardly merited by the claims in this case.

After Bowers, this Court rejected

substantive due process claims in DeShaney v. Winnebago County DSS, 109 S. Ct. 998 (1989), involving the reaction of the state to a child abuse complaint.

> The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act. . . . But they should not have it thrust upon them by this court's expansion of the Due Process Clause of the Fourteenth Amendment.

Id. at 1007. The people of Alabama may well have preferred a different "system of liability" for punitive damages prior to 1987, but like the people of Wisconsin, "they should not have it thrust upon them by this Court's expansion of Due Process." Id.

Bowers and DeShaney demonstrate the tremendous constraints in the area of due process. The interests asserted in these cases are critical, private, basic, and broad reaching, yet the power of the states to formulate and implement policy outside of a direct constitutional claim

must prevail.

In the present case, petitioner's quest to be free from pre-1987 Alabama punitive damages involves neither a fundamental right, nor a recognized personal autonomy interest. The state of Alabama need show only that its system for awarding punitive damages is rational and furthers a valid state objective.

The ultimate crisis caused by an overexpansive view of substantive due process is found in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), where Chief Justice Taney used due process for redefining evolving economic interests that pertained to slavery. The catastrophic consequences of Dred Scott illuminate two canons of constitutional interpretation. Rehnquist, The Supreme Court at 144. The first requires restraint in the use of the Constitution to resolve a matter addressed appropriately by other standards. Id.

Alabama has addressed the problem of punitive damages through recent legislation, as have numerous states. See Appendix A. The second holds that a mere sense of unfairness is not a basis to declare a law unconstitutional. "[A] sense that a law is unfair, however deeply felt, ought not to be itself a ground for declaring an act of Congress void." Id. at 145.

> Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.

Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 700 (1976).

In light of the modern constitutional history of substantive due process, it is difficult to envision why this Court would seek to second-guess evolved rational economic policy. "If determinations limiting the availability of punitive damages are

to be made, this determination must be made by the state legislature." Puppe, 733 F. Supp. at 1362.

B. Substantive Due Process Is Not Offended by Juries Making Property-Affecting Decisions in Punitive Damage Cases.

If a law is "so vague and standardless . . . [and] leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards what is prohibited and what is not," then the law is void for vagueness. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966). Petitioners contend that the Alabama system was standardless because it contained no fixed levels, caps, or other precise limitations. In Smith v. Wade, 461 U.S. 30, 56 (1983), this Court found that "a jury may be permitted to assess punitive damages in an action under 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or

when it involves reckless or callous indifference to federally protected rights of others." This Court required no more in terms of precision, nor did it impose a ceiling on punitive damages.

We trust juries to guard against the misuse of power and to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). Since this Court is willing to allow juries to decide matters of life and death, they should be trusted "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 824 (1987).

The state of Alabama uses juries as a means of effecting property interests. To

suggest that a jury is an irrational choice or that jurors are inherently arbitrary or incapable of making intelligent choices offends the American system of jurisprudence.[18] Jurors take seriously the responsibility of assessing culpability and award amounts and, on a national level, tend to deny punitive damages in the vast majority of cases, making modest awards in those few cases where punitive damages are deserved. Daniels & Martin 1990 at 35-39, 56-60. From the earliest British punitive damage cases forward, there has been a "respect for the jury's discretion and a hesitancy to interfere with its judgment." Borowsky & Nicolai-

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[18]The issue of the competence of jurors to make proper choices hardly seems proper for argument. See Newport v. Fact Concerts, 453 U.S. 247, 270 (1981); Brotherhood of Elec. Workers v. Foust, 442 U.S. 42, 50-51 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974). See also Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916, 925 (Ala. 1981), and compare Commodore Corp. v. Bailey, 393 So. 2d 467 (Miss. 1981).

sen, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 152 (1983) (footnotes omitted). The underlying reason for empowering the jury in this area is obvious:

> [T]he jury is in the best possible position to function as the communities' conscience. The jury's reaction of shock and outrage presumably mirror those of the community as a whole. Thus when the jury decides to make a punitive award, it is expressing society's disapproval; and when it sets the amount of the award, it measures societies' outrage and determines the degree of punishment that society believes will deter the defendant and others like him.

Borowsky & Nicolaisen at 152-53.

C. Properly Instructed Jurors in Alabama Use Comprehensible Standards to Determine Punitive Damage Levels.

This Court's invitation to consider punitive damage levels in due process terms[19] has given rise to a series of

[19] See Browning-Ferris, 109 S. Ct. at 2923 (1989) (Brennan, J., concurring, joined by Marshall, J.); id. at 2924 (O'Connor, J., concurring, joined by Stevens, J.); Crenshaw, 486 U.S. at 87-88 (1988) (O'Connor, J., concurring, joined by Scalia, J.).

cases which assess the means by which states instruct juries on damages. Typical of the post-Browning-Ferris cases is Man v. Raymark Indus., 728 F. Supp. 1461 (D. Haw. 1989), where the court assessed the Hawaii system of jury instructions for punitive damages. The standards in Hawaii are similar to those in Alabama. As to standard of proof, Alabama required proof by a preponderance of the evidence prior to 1987, while Hawaii requires proof by clear and convincing evidence. Although this difference is meaningful, it is hardly the basis for finding one standard constitutional and the other unconstitutional.

Based on these standards, the court found the Hawaii system comported with and exceeded requirements established by this Court in Smith v. Wade, 461 U.S. 30 (1983), and in Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). "[T]he

standard established by Hawaii law is sufficient to apprise potential defendants and juries of both the nature of the conduct which may expose one to punitive damage liability as well as what level of award is appropriate under the circumstances." 728 F. Supp. at 1465. In virtually every case examining punitive damages since Browning-Ferris, based on the standards in the Hawaii case that reflect the law of the state of Alabama, the result has been the same. See Appendix B listing post-Browning-Ferris cases where a due process claim was raised.

At the time the present case went to trial, Alabama had evolved standards for punitive damages that focused on punishment and deterrence. Badgett v. McDonald, 304 So. 2d 228 (Ala. Civ. App. 1974); Ex parte Smith, 412 So. 2d 1222 (1982). The amount is left to the sound discretion of the jurors who act "with regard to the

enormity of the wrong and the necessity of preventing a similar wrong." J. Truett Payne Co. v. Jackson, 281 Ala. 426, 429, 203 So. 2d 443, 446 (1967); Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060, 1076 (Ala. 1984). The amount "must not exceed an amount that will accomplish society's goals of punishment and deterrence." Green Oil v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989). The level of wrongdoing required prior to finding liability for punitive damages was fraud that was gross, oppressive, or aggravated. Mobile Dodge, Inc. v. Waters, 404 So. 2d 26 (Ala. 1981). These standards reflect an intense, internal debate within the Alabama court system demonstrating careful and well evolved measures.[20]

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[20] See Alabama Pattern Jury Instructions § 11.03 (1974):

> The purpose of awarding punitive damages or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the

(Cont'd)

The trial judge in the present case gave instructions "to punish the defendant . . . make an example. . . . take into consideration the character and degree of wrong [and prevent] similar wrongs." R.T. at 897-98. The trial judge enunciated the purpose of punitive damages and explained the level of culpability needed, as expressed in the caselaw, to warrant a punitive damage award. The standards are clear, and the jury was properly instructed. To contend that this is a "standardless" process flawed by vagueness or that the judge failed to communicate state law is to deny fact.

D. **There Is Rational Review of Punitive Damage Awards.**

Alabama review of punitive damages

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defendant and for the purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. . . . You must take into consideration the character and degree of wrong as shown by evidence in the case, and the necessity of preventing similar wrongs.

includes conventional remittitur, a petition process for a new trial, an appeal of the denial of either, and de novo review of the jury's verdict on appeal.[21] Bias, passion, prejudice, corruption, improprieties, or excessiveness are grounds for a new trial court unless the plaintiff accepts a remittitur.[22]

Post-verdict review by the trial judge in the present case was guided by Green Oil v. Hornsby, 539 So. 2d 218 (Ala. 1989), and Hammond v. City of Gasden, 493 So. 2d 1374 (Ala. 1986), requiring judges

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[21]Ala. Code § 12-22-71 (1975).

[22]"When the record establishes that the award is excessive or inadequate as a matter of law, or where it is established as reflected in the record the verdict is based upon bias . . . may a trial court order a new trial ro remittitur." Hammond v. City of Gasden, 493 So. 2d 1374, 1379 (Ala. 1986). Post-trial hearings include consideration of "the culpability of the defendant's conduct, Ridout's-Brown Service, Inc. v. Holloway, 397 So. 2d 125 (Ala. 1981); the desirability of discouraging others from similar conduct, Ford Motor Credit Co. v. Washington, 420 So. 2d 14 (Ala. 1982); the impact upon the parties, Alabama Power Co. v. Hussey, 291 Ala. 586, 285 So. 2d 92 (1973)."

to explain in written orders punitive damage awards, taking into account the level of the defendant's culpability, various wealth-based factors, and the existence of other sanctions imposed on the defendant. These standards have led to reversal or modification of a number of jury or lower court decisions.[23]

The system for awarding and reviewing punitive damages in Alabama was designed to catch and change jury decisions that are arbitrary or irrational. Jury instructions reflect a rational, pro-consumer state policy, and trial and appellate

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[23] See, e.g., Burroughs Co. v. Hall Affiliates, 423 So. 2d 1348 (Ala. 1982), reversal on failure to find appropriate level of culpability; Treadwell Ford v. Leek, 272 Ala. 544, 547, 133 So. 2d 24, 26 (1961), reversed for failure to find intent; Mobile Dodge v. Waters, 404 So. 2d 26 (Ala. 1981), failure to find malice; United Services Auto. Assn. v. Wade, 544 So. 2d 906 (Ala. 1989), amount reduced by $1 million after review. See also Waste Disposal v. Stewart, 432 So. 2d 1255 (Ala. 1983), Courtesy Ford Sales, Inc. v. Clark, 425 So. 2d 1075 (Ala. 1983), and Ex parte Smith, 412 So. 2d 1222 (Ala. 1982), regarding the need for precise findings of deceipt.

court review provide fundamental safeguards that comport with fundamental due process.

E. Tort Reform Legislation in 1987 Refined Punitive Damages Law and Reflects the Social and Economic Policy of the State.

In 1987 Alabama adopted new guidelines for punitive damage cases. Ala. Code § 6-11-20 through 6-11-30 (Supp. 1988). The law affects burden of proof, presumptions of correctness of jury verdicts, award levels, vicarious liability, and appellate process. Id. Alabama has formed its own safeguards without external mandate for all punitive damage cases.

In Crenshaw, supra, this Court expressed a clear desire for states to evaluate their tort systems.

> Our review . . . now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the . . . State Legislature might choose to enact legislation addressing punitive damage awards . . . [or] state courts may choose to resolve the issue by relying on the State Constitution or on some other

adequate and independent non-federal ground.

486 U.S. at 79-80. Since the law at the time the present case was decided was facially constitutional, and the law in place today is explicitly responsive to this Court's request in Crenshaw, an intrusive decision elaborating on punitive damages would smack of judicial opportunism.

F. The Alabama System for Determining Punitive Damages Comports with the Requirements of Procedural Due Process.

A true failure of appropriate process is a most serious constitutional matter. Were the petitioner denied notice of a legal standard, sanctions or the process whereby its property interests would be affected, or were there a denial of an opportunity to be heard at the pretrial, trial, post-trial, or appellate review level, this Court would be obligated to move aggressively. This case does not involve a denial of an opportunity to be

heard or notice, but rather a disagreement over the wisdom of substantive choices made by Alabama. Such is hardly an appropriate matter for a due process review.

The action of a court or an official of the judicial branch constitutes state action for the purposes of the Fourteenth Amendment when their acts affect a constitutionally protected interest. Shelley v. Kraemer, 334 U.S. 1, 14 (1948). A person compelled to rely upon the authority of a court to settle a civil dispute must be given a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371, 377 (1971). Deciding what processes are due requires a balancing of interests articulated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Mathews established a three-part test for balancing various interests when the state action affects life, liberty, or property requiring an assessment of the private interests and

government interests affected, as well as the risk of error in the process.

The nature of the specific interest effected is of consequence as it can dictate the process required. Neither the loss of life nor liberty is at issue in a punitive damages case.[24] There is then only a "simple property" interest involved in this case. This Court has previously held that a property interest may not enjoy the same procedural protections as life or liberty interests. See, e.g., Lassiter v. Dept. of Social Services, 452 U.S. 18, 41 n.8 (1981) (Blackmun, J., dissenting); and Phillips v. Commissioner,

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[24]It has been argued that punitive damages deprive a party of liberty and property because such an award can harm a person's reputation. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 278-84 (1983). This argument is flatly at odds with Paul v. Davis, 424 U.S. 693 (1976), and Bishop v. Wood, 426 U.S. 341, 348 (1976), where this Court held that there is no liberty interest in reputation. But see Brandt v. Board of Co-Op Education, 820 F.2d 41, 43 (2d Cir. 1987).

283 U.S. 539, 596-97 (1931).

In light of this background, it is appropriate to ask whether the process provided petitioner conformed with the baseline constitutional requirements of due process for protection of a property interest. This analysis, as with any procedural due process question, should be centered on notice and an opportunity to be heard. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985); Brock v. Roadway Express, 481 U.S. 252 (1987). Petitioner is entitled to notice of the standards of culpability and evidence proffered by his adversary, to an opportunity to respond and present his own evidence, and to a timely process. These procedural entitlements were provided.

Petitioner claims, however, that it was entitled to "better" jury instructions, including limits on liability, to more oral clarity from the judge who gave

the jury instructions, and to a "better" set of laws regarding punitive damages. These matters may be of great consequence, but they are not part of a procedural due process analysis. They are substantive law issues vested to the best judgment of the state of Alabama. In a due process punitive damage case decided this spring, a North Dakota court assessed accurately the complainant's rights:

> Procedural due process guarantees only that there is fair decision-making process before the government takes some action directly impairing a person's life, liberty, or property. This procedural aspect of the due process clause does not protect against the use of arbitrary rules of law which are the basis of those proceedings.

Puppe, 733 F. Supp. at 1360 (footnotes omitted). See also Section III.

Petitioner's contentions have merit only if this Court accepts the proposition that there are no jury instructions, no guidance at all, in contravention of this Court's ruling in Giaccio v. Pennsylvania,

382 U.S. 399 (1966). As has been demonstrated, however, the jury in this case was given instruction on culpability and damage amounts that required the jury to consider punishment, deterrence, and the nature of the wrongdoing. (RT 896-898.) Based on the rulings of this Court and courts reviewing similar systems, this is not a "standardless" process.[25]

As previously noted, the methodology for determining process entitlements requires an assessment of petitioner's private interests, in this case money. Specifically, petitioner would like greater certainty and predictability regarding the potential of a large punitive damage award. Such information would allow petitioner to modify its rate base and ensure

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[25] Smith v. Wade, 461 U.S. 30 (1983); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989); Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990); Man v. Raymark Indus., 728 F. Supp. 1461 (D. Haw. 1989).

against the "sting" of a punitive damage award. As already demonstrated, a component of uncertainty forwards the rational state interest in the punishment function of punitive damages. (See Section II, Part C.)

Petitioner's interest in certainty regarding disposition of his property runs in tandem with petitioner's allegation that the Alabama jury system presents a dangerously high risk of erroneous decisionmakiong, the second leg of the Mathews test. Petitioner argues that the jury was given unfettered discretion in this case to make an award of punitive damages in any amount it wished. The jury in this case heard all of the evidence at trial, including the petitioner's defenses. They were instructed that they did not have to award punitive damages, but if they chose to, the amount should reflect what is necessary to punish, deter, and make an

example of the petitioner and take into consideration the character and degree of the wrong committed by the petitioner. (RT 898 et seq.)

The foregoing process is constitutionally sufficient,[26] particularly in light of the fact that the trial judge conducted a review of the award returned by the jury in light of Hammond v. City of Gasden, 493 So. 2d 1374 (Ala. 1986). To say that there is a high risk of error requires the belief that jurors make bad decisions when properly instructed, hardly a convincing position.

The final leg of a Mathews analysis requires an assessment of the governmental

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[26] A very similar complaint was raised in Germanio, supra, regarding procedural due process and punitive damages. That court found the "[d]efendants [are] afforded every opportunity consistent with the requirements of due process in civil cases, including the right to present mitigating evidence on the punitive damage issue, should the case reach that juncture." Germanio, 732 F. Supp. at 1304.

interest in the challenged process. In this case a procedural due process attack has been levied against the use of a jury and the content of Alabama law. The state has a significant interest in maintaining a punitive damage system that allows juries to express the will of the state to punish intentional wrongdoers and deter future destructive behavior.[27]

These are powerful interests in comparison with the private interest of the defendant. In light of these interests, it is hard to conceive of a reasoned analysis that would compel this Court to rewrite the laws of Alabama based on a failure of procedural due process. The phrases used by the trial court judge could have been articulated more clearly.

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[27]Juries are often called upon to make important decisions on matters affecting the well being of the community. See Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), and Miller v. California, 413 U.S. 15 (1973).

Poor grammar, however, does not make a judicial instruction unconstitutional. Improving, refining, and analyzing judicial instructions is a proper task for a judicial conference. It is wholly inappropriate, however, to use the Constitution to fine-tune judicial instructions.

G. Punitive Damages Are Not Criminal Sanctions Entitled to Special Procedural Protections.

The finding in Browning-Ferris Indus. v. Kelco Disposal, Inc., supra, put to rest the question of whether punitive damages were "criminal" in nature, obligating courts to consider a more broad range of procedural protections. Petitioners and amici refuse to accept this fact and contend that they are criminal, necessitating a brief response.

Punitive damages serve multiple purposes including punishment. The mere fact that one of the purposes underlying punitive damages is similar to one of the pur-

poses underlying criminal law does not change the stark legal fact that punitive damages are recognized to "have long been a part of traditional state tort law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

Implicitly, Silkwood allows for the recognition of different protective regimes within our legal system. Civil fines address governmental needs, ensuring the implementation of legislatively-mandated behavioral norms, e.g., 42 U.S.C. § 2011 et seq. (1976 ed. and Supp. V), and are subject to scrutiny by the federal courts, while punitive damages are subject to scrutiny pursuant to state tort law principles. 464 U.S. at 257.

To characterize punitive damages as civil fines and then move civil fines into the domain of criminal fines requires a large jurisprudential leap, ignoring whole blocks of established precedent. Kelly v.

Robinson, 479 U.S. 36, 49 n.10 (1986).[28]

Punitive damages are not criminal sanctions. They derived from the system of private wrongs, not public wrongs. There is not a single instance in all of American jurisprudence in which a court has accepted the proposition that a state common law tort remedy (not a legislative sanction) could somehow be recharacterized as a criminal sanction.[29]

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[28] San Francisco Civil Service Ass'n v. Superior Court of Marin County, 16 Cal. 3d 46, 49, 127 Cal. Rptr. 131, 134, 544 P.2d 1331, 1334 (1976), deals with the relationship between fines and punitive damages, holding that fines "collected civilly are not punitive damages. . . ," following § 908 of the Restatement (Second) of Torts, comment a (1977).

[29] Presented with the precise contention that the "criminal" nature of punitive damages compels a different process, the court in Germanio, held:

> We do not see any reason why this Court should extend other protections normally enjoyed only by criminal defendants to defendants in a tort case faced with the claim for punitive damages. The framers of the Bill of Rights and the Fourteenth Amendment could easily have done so, and did not.

732 F. Supp. at 1304 (footnote omitted).

IV

VICARIOUS LIABILITY ASSURES ACCOUNTABILITY AND COMPORTS WITH DUE PROCESS.

The petitioner and various amici have argued that it is unfair to compel Pacific Mutual to pay punitive damages for the intentional misconduct of an agent of Pacific Mutual based on vicarious liability. The agent was authorized to make representations on behalf of Pacific Mutual. His misdeeds were outside the range of practices approved by Pacific Mutual. Nonetheless, to employees like Cleopatra Haslip he gave reasonable assurance that he was operating on behalf of Pacific Mutual.

Though it has been argued that Pacific Mutual was on notice of the agent's activity, that is not essential to finding Pacific Mutual liable. "The majority of courts . . . have held that the vicarious liability of the master for acts within the scope of the employment extend to punitive . . . damages, . . . [particularly] if damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts. . . ." Prosser & Keaton on Torts 13 (5th ed. 1984).[30]

American Society of Mechanical Engineers v. Hydrolevel, 456 U.S. 556 (1982), held that nonprofit organizations can be liable for the misdeeds of its agents when the organization neither ratifies nor authorizes the intentional misconduct, where the agent's behavior is secret, and the misconduct is solely for his benefit. Hydrolevel reaffirms the principle of corporate accountability. More than a half-century ago, this Court held that "few doctrines of law are more firmly

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[30]Punitive damages can be assessed against a corporation for the misconduct of its agents without violating due process. Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927); St. Louis I. M. & S. Ry. v. Taylor, 210 U.S. 281 (1908); Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907).

established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." Gleason v. Seaboard Airline Arco, 278 U.S. 349, 357 (1929). The line between Gleason and Hydrolevel is unbroken. The policy underlying this case series is simple: the public, consumers, must be able to rely upon the representations of agents who are cloaked with the authority to act on behalf of corporations. When those representations prove to be fraudulent they are, for better or worse, the representations of the corporation.[31]

Were this Court to find that it is inappropriate to impose punitive damages

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[31] See Ricketts v. Pennsylvania Railroad Co., 153 F.2d 757, 759 (2d Cir. 1946), where Judge Learned Hand wrote "an agent does not cease to be acting within the scope of his authority when he is engaged in a fraud upon a third person. . . . [T]he third person has no means of knowing that the agent is acting beyond his authority. . . ."

on Pacific Mutual for the misdeeds of its agent, it would permit insurance companies to look quietly the other way while their agents engaged in fraudulent activity. The deterrent or incentive value of punitive damages would be lost. The maximum exposure of a company is likely to be nothing more than the obligations created by nonfraudulent transactions.

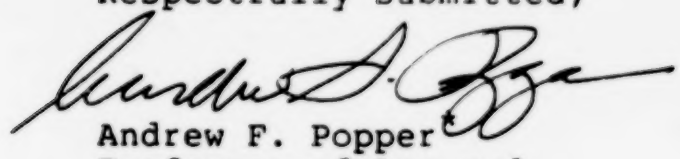
If the punitive damage award is upheld Pacific Mutual will be forced to pay out a large sum of money it had hoped greatly to use for other purposes. It will communicate with its agents nationwide. It will upgrade its review of field agents using the Pacific Mutual name. In short, Pacific Mutual will take every possible step to prevent this type of misconduct in the future. Other insurance companies will learn quickly of Pacific Mutual's behavior; like trade associations after Hydrolevel, they will take steps to

prevent misconduct by agents acting with apparent authority.

CONCLUSION

It has been demonstrated that there is no punitive damage crisis sufficient to warrant judicial intervention, that punitive damages provide multiple benefits and further rational state objectives, and that the Alabama system for determining punitive damages comports with the requirements of procedural and substantive due process. Accordingly, the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,



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*This is to extend deepest appreciation to Robert Brener, Anne Guy, Nancy Juda, and Richard Sauer for their fine work in preparing this brief.

APPENDIX A

Legislation proposed in Congress to modify punitive damages includes:

1. S. 1400, 101st Cong., 1st Sess. (1989)

2. H.R. 2700, 101st Cong., 1st Sess. (1989)

3. H.R. 1115, 100th Cong., 1st Sess. (1987)

4. S. 2760, 99th Cong., 2d Sess. (1986)

5. S. 1999, 99th Cong., 1st Sess. (1985)

6. S. 100, 99th Cong., 1st Sess. (1985)

7. S. 44, 98th Cong., 1st Sess. (1983)

8. S. 2631, 97th Cong., 2d Sess. (1982).

The following are examples of state "tort reform":

1. Ala. Code § 6-11-20 et seq. (Supp. 1988)

2. Alaska Stat. § 09.17.020 (Supp. 1988)

3. Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990)

4. Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986)

5. Conn. Cen. Stat. § 52-240(b) (Supp. 1989)

6. Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989)

7. Ga. Code Ann. § 51-12-5.1 (Supp. 1989)

8. Idaho Code § 6-1604 (Supp. 1989)

9. Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989)

10. Ind. Code Ann. § 34-4-34-2 (Burns 1986).

11. Iowa Code Ann. § 668A.1 (West 1987)

12. Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989)

13. Ky. Rev. Stat. §§ 411.184, 411.186 (1988)

14. Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988)

15. Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990)

16. Mont. Code Ann. § 27-1-221 (1987)

17. Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989)

18. N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988)

19. N.J. Stat. Ann. § 2A:58C-5 (West 1987)

20. N.D. Cent. (Page Supp. 1988)

21. Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988)

22. Okla. Stat. Ann. tit. 23, § 9 (West 1987)

23. Or. Rev. Stat. §§ 30.925; 18.540, 41.315 (1987)

24. S.C. Code Ann. § 15-33-135 (Supp. 1988)

25. S.D. Rev. Code § 21-1-4.1 (1987)

26. Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 et seq. (Vernon Supp. 1990)

27. Utah Code Ann. § 78-18-1 (Supp. 1989)

28. Va. Code Ann. 8.01-38.1 (Supp. 1989)

APPENDIX B

The following cases are typical of due process challenges to punitive damage systems after this Court's decision in Browning-Ferris:

1. Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989) (refused to tamper with punitive damage system based on traditional due process requirements).

2. Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990) (more precise and restrictive standards for imposing punitive damages are foreclosed by Racich).

3. Eichenseer v. Reserve Life Ins., 881 F.2d 1355 (5th Cir. 1989) (Mississippi law of punitive damages does not violate Fourteenth Amendment due process standards).

4. Campbell v. A.C. & S., 704 F. Supp. 1020 (D. Mont. 1989) (punitive damage law not unconstitutionally vague).

5. Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990), and Leonen v. Johns-Manville Corp., 717 F. Supp. 272 (D.N.J. 198889) (punitive damage awards in New Jersey do not deny due process).

6. Horowitz v. Schneider Nat., 708 F. Supp. 1573 (D. Wyo. 1989) (Wyoming punitive damage law comports with due process).

7. Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989) (Minnesota punitive damage law is constitutional).

8. Hospital Authority v. Jones, 259 Ga. 759, 386 S.E.2d 120 (1989) (Georgia punitive damages system meets parameters of due process).

9. Lazarus Dept. Store v. Sutherlin, 544 N.E.2d 513 (Ind. App. 1 Dist. 1989) (Indiana punitive damage awards do not violate due process).

10. Stoner v. Nash Finch, 446 N.W. 2d 747 (N.D. 1989) (North Dakota punitive damages system not constitutionally defective).